Supreme Court, U. S.
FILED
JAN 17 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1976

No. 76-986

CHRISTOS L. NETELKOS and
GEORGETTE YSRAEL,
Petitioners,

against

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BERNARD JAY COVEN P.C.
Attorneys for Petitioners
747 Third Avenue
New York, N. Y. 10017

BERNARD JAY COVEN
of Counsel

TABLE OF CONTENTS

	PAGE
Opinion Below	2
Jurisdiction	2
Questions Presented for Review	2
Statutes Involved	6
Statement of Case	6
Reasons for Allowance of Writ	13

INDEX TO APPENDIX

Appendix A

Judgment Order of Court of Appeals	A-1
Order on Petition for Rehearing—Netelkos	A-3
Order on Petition For Rehearing—Ysrael	A-4

Appendix B

15 U.S. Code Section 78h(c)	B-1
15 U.S. Code Section 78q(a)	B-3
15 U.S. Code Section 78ff	B-4
18 U.S. Code Section 371	B-1
18 U.S. Code Section 1001	B-5
28 U.S. Code Section 2106	B-5
17 C.F.R. Section 240.8c-1	B-2
17 C.F.R. Section 240.10b-5	B-2
17 C.F.R. Section 240.17a-3	B-4
17 C.F.R. Section 240.17a-5	B-3

PAGE

Table of Cases

Ashe v. *Swenson,* 1969, 397 U.S. 436, 25 L. Ed. 2d 469, 90 S. Ct. 1189 ..... 21, 22
U. S. v. *Austin* (6th Cir. 1976), 529 F. 2d 559 23
U. S. v. *Borelli* (2nd Cir. 1964), 336 F. 2d 376, cert. denied sub. nom. *Cinquegrano* v. *U. S.,* 1965, 379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 2d 555 16
Blumenthal v. *United States,* 1947, 332 U.S. 539, 92 L. Ed. 154, 68 S. Ct. 248 18
U. S. v. *Charnay* (9th Cir. 1976), 537 F. 2d 341 14
U. S. v. *Dansker* (3rd Cir. 1976), 537 F. 2d 40 15
U. S. v. *Fusco* (7th Cir. 1970), 427 F. 2d 361 ..... 21, 22
U. S. v. *Garner* (6th Cir. 1976), 529 F. 2d 562 22
U. S. v. *Indian Trailer Corp.* (7th Cir. 1955), 226 F. 2d 595 17
U. S. v. *Jones* (6th Cir. 1976), 533 F. 2d 1387 21
U. S. v. *Kelly* (2nd Cir. 1965), 349 F. 2d 720, cert. denied, 1966, 384 U.S. 947 ..... 16, 17, 18, 19
Lincoln Bank v. *Lampe* (N.D. Ill. E. D. 1976), 414 F. Supp. 1270 14
U. S. v. *Mathias* (D.C. App. 1976), 535 F. 2d 1303 17
U. S. v. *O'Connor* (2nd Cir. 1956), 237 F. 2d 466 17
Rich, et al. v. *Touche Ross & Co.* (S.D.N.Y. 1976), 415 F. Supp. 95 14
Schaffer v. *United States,* 1960, 362 U.S. 511, 4 L. Ed. 2d 921, 80 S. Ct. 945 19
U. S. v. *Spletzer* (5th Cir. 1976), 535 F. 2d 950 15
U. S. v. *Stein* (2nd Cir. 1976), —— F.2d —— (Slip op. 76-1299) ..... 20, n.(10)
Superintendent of Insurance v. *The Bankers Life and Casualty Company,* 1971, 404 U.S. 6, 30 L. Ed. 2d 128, 92 S. Ct. 165 ..... 14, 15
U. S. v. *Swallow* (10th Cir. 1975), 511 F. 2d 514 17
Woolsey v. *U. S.* (8th Cir. 1973), 478 F. 2d 139 21

PAGE

Other Authorities Cited

Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit (1962), 32 F.R.D. 249 (1963), Remarks of Kaufman, J. 21
Committee on Rules of Practice and Procedure of the Judicial Conference of the United States—Proposed Rule 35.1 22
National Commission on Reform of Federal Criminal Laws, Working Papers (July 1970), p. 341 23

IN THE

Supreme Court of the United States

October Term, 1976

CHRISTOS L. NETELKOS and
GEORGETTE YSRAEL,
Petitioners,

against

UNITED STATES OF AMERICA
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Christos L. Netelkos and Georgette Ysrael, respectfully pray that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Third Circuit rendered on November 12, 1976, affirming a judgment of the United States District Court for the District of New Jersey convicting petitioners of conspiracy, in violation of Title 18 United States Code Section 371: to hypothecate securities without customer consent (Title 15 U.S. Code Sections 18h(c), 78ff(a) and Title 17 Code of Federal Regulations Section 240.8c-1); to sell customer securities without customer direction to sell (Title 15 U.S. Code Sections 78j(b) and 78ff(a) and Title 17 Code of Federal Regulations Section 240.10b-5); to maintain false books and records (Title 15 U.S. Code Sections 78q(a) and

78ff(a) and Title 17 Code of Federal Regulations Section 240.17a-3); to file false reports to the Securities and Exchange Commission (Title 18 U.S. Code 1001); to file a false report to the Securities and Exchange Commission (Title 15 U.S. Code Sections 78q(a) and 78ff(a), Title 17 Code of Federal Regulations Section 240.17a-5). Petitioner Netelkos was charged with and convicted of 33 substantive counts, all of which were alleged in the conspiracy count both as objects of the conspiracy and as overt acts. Petitioner Ysrael was sentenced to imprisonment for a term of 18 months. Petitioner Netelkos was sentenced to a term of eleven (11) years and a fine of $50,000, the petitioner to stand committed until such fine was paid. The trial was had before Stern, D.J. and a jury.

Opinion Below

No opinion was rendered by the United States Court of Appeals herein.

Jurisdiction

The judgment of the aforesaid Court of Appeals was rendered and entered on November 12, 1976. A timely petition for rehearing en banc was denied on December 20, 1976.

The jurisdiction of this Court is invoked under 28 U.S. Code Sec. 1254 (1). The basis for federal jurisdiction in the United States District Court was the provisions of Title 18 U.S. Code Sections 371, 1001; Title 15 U.S. Code Sections 78h(c), 78j(b), 78q(a), and 78ff(a); Title 17 Code of Federal Regulations, Sections 240.8c-1, 240.10b-5, 240.17a-3 and 240.17a-5.

Questions Presented for Review

1. Where a registered broker-dealer of securities, in the normal course of its business, is in possession of customer's

securities as a bailee, with the consent of the customer, is it a federal offense, violative of Rule 10b-5 (Title 17 C.F.R. 240.10b-5), for the broker-dealer to later sell such securities, in the course of its business, to another registered broker-dealer without direction by the customer to sell, and to use the proceeds in its business?

2. Does the sale of a customer's securities by a broker-dealer without the direction of its customer come within the limiting provisions of Rule 10b-5 that the fraud charged be "in connection with the purchase or sale of a security" where the indictment did not charge and the Government did not seek to prove that the customer suffered injury as a result of any practices touching his purchase of the securities as an investor?

3. Where after trial the Court dismissed counts of the indictment, holding that it was not a federal offense, violative of Rule 10b-5, for a broker to misappropriate the proceeds of the sale of a security which was delivered by the customer to the broker to sell, is such ruling the law of the case so as to require dismissal of counts likewise charging a violation of Rule 10b-5, where a broker, with the consent of the customer, is in possession of customer securities as a bailee, sells the securities without direction by the customer to do so and misappropriates the proceeds, absent any charge in the indictment or trial proof of fraud upon the customer touching his purchase of the securities as an investor?

4. Was it plain error for the Court to give a charge, with respect to the conspiracy count, equivalent to an instruction that the jury could not acquit one defendant of conspiracy without acquitting all of the other defendants (the "all or nothing" charge)?

5. Was it plain error with respect to Ysrael, a minor fringe defendant charged only with conspiracy, for the trial court to give an "all or nothing" charge with respect to the conspiracy count?

6. Where the trial took eight weeks, produced 7,000 pages of testimony of over 30 witnesses and over 1000 exhibits, almost all of a highly technical nature involving securities law, was it plain error for the trial court to refuse to marshall the evidence and to charge the defendants' theory of the case?

7. Where the attorney for Netelkos informed the trial Court that he had no previous trial experience and did not have the expertise in securities matters to examine government witnesses, necessitating the examination of such witnesses by the defendant himself, was it plain error for the trial court to refuse a request to marshall the evidence and charge defendants' theory of the case?

8. Was it such a departure from the usual course of judicial proceedings to call for the exercise of supervision by this Court where the trial Court gave an "all or nothing" charge, refused to marshall the evidence after a lengthy complex trial and defined reasonable doubt as a doubt which exists, when upon a consideration of all of the evidence, "the jury would be unwilling to rely upon that evidence unhesitatingly in the most important of its own affairs"?

9. Does an appellate court have the inherent power, pursuant to Section 2106 of Title 28 U.S. Code to modify the disparate sentence of eleven years given petitioner Netelkos, notwithstanding such sentence is within statutory limitations?

10. Where conviction of petitioner Netelkos on various substantive counts rest upon the same ultimate facts or

transactions can multiple and consecutive sentences be constitutionally sustained under the double jeopardy provision of the Fifth Amendment to the United States Constitution?

11. Where the substantive and conspiracy counts of an indictment charged petitioner Netelkos with essentially the same offense, and the same evidence was relied upon to prove all counts, proof being offered by the Government indiscriminately on all counts, was petitioner Netelkos' rights under the Fifth Amendment to the United States Constitution infringed by imposition of multiple and consecutive sentences on conviction of all counts of the indictment?

12. Assuming, *arguendo,* that the appellate court had the inherent power to modify a sentence, pursuant to the provisions of Section 2106 of Title 28 U.S. Code, was there such a departure from the usual course of judicial proceedings, in the nature of an abuse of discretion, to call for the supervision of this Court, where the appellate Court failed to vacate a lesser concurrent sentence imposed upon petitioner Netelkos where prejudice is urged on the ground that multiplicity of sentences unfairly impairs his opportunities for pardon or parole?

13. Where seven defendants are charged with conspiracy and tried jointly, was it plain error for the trial court to totally neglect to protect any defendant with interim instructions or instructions at the close of the case on admissibility, limitations of the bearing of evidence and exhibits as against particular individuals?

14. Was it such a departure from the usual course of judicial proceedings to call for the exercise of the supervision of this Court where petitioner Ysrael, a fringe defendant charged with one count of conspiracy, was refused a

severance by the trial court where she was prejudiced by the accumulation of eight weeks of testimony of alleged wrongdoing by co-defendants on 124 substantive counts[1] and where the trial Court failed to give any interim instructions or any instructions at the close of the case to protect petitioner against prejudicial and inadmissible evidence and exhibits refused to marshall the evidence, and gave an "all or nothing" charge with respect to the conspiracy count?

Statutes Involved

The statutes involved are Title 18 U.S. Code Sections 371, 1001 and 2; Title 15 U.S. Code Sections 78h(c), 78j(b), 78q(a) and 78ff(a); Title 17 Code of Federal Regulations, Sections 240.8c-1, 240.10b-5, 240.17a-3 and 240.17a5.

The pertinent provisions of these statutes are set forth in Appendix B *infra* at pp. 11.

Statement of the Case

The trial of the case took eight weeks and produced a transcript of 7,000 pages, most of which involved complex of technical testimony with reference to securities violations and some 1,000 voluminous exhibits. As moved to trial the indictment contained 125 counts, which would have required a jury to return 600 verdicts. At the close of the case a reluctant prosecutor was persuaded to reduce the counts submitted to the jury to 34 of which one was a conspiracy count. Petitioner Ysrael was charged with one count of conspiracy and petitioner Netelkos was charged with all 34 counts.[2]

[1] The indictment as moved to trial contained 125 counts. Near the close of the trial the indictment was reduced to 34 counts.

[2] The case went to trial with seven defendants. Two defendants, Dita and Pascall obtained severances at the close of the Government's case. The five remaining defendants were charged with conspiracy. All defendants, excepting petitioner Ysrael, were charged with all substantive counts.

The conspiracy count alleged as its objects and cited as overt acts, all of the substantive counts, and included all of such counts verbatim by an allegation of incorporation by reference. The substantive counts charged the petitioner Netelkos and co-defendants Gamarekian, Rega and Santoriello with causing Christian Paine & Company, Inc. ("CP") a broker-dealer in securities: to hypothecate customer securities not having first obtained customer consent;[3] to sell customer securities without direction to sell;[4] to maintain false books and records;[5] to file a false report with the Securities and Exchange Commission.[6]

The indictment was prolix and the substantive counts were fragmented and overlapped. To maximize counts the pleader took a balance sheet or entry said to be false and made various lines or entries and combinations the basis for individual counts. Using this method hundreds of combinations were possible for a skillful pleader. The defendants who were charged in substantive counts with causing CP to submit to the Securities and Exchange Commission false books and records found themselves also charged, in separate counts, for maintaining these false books and records. In count 34 of the indictment the defendants charged with substantive offenses were alleged to have caused CP to submit to the Securities and Exchange Commission a false broker-dealer report on form X-17A-5 (a periodic report form). The matter contained in this form is taken verbatim from the trial balance. The alleged false items in this report are also pleaded as the basis of the other substantive

[3] Counts 2 through 8, citing Title 15 U.S. Code Section 78h(c) and Title 17 C.F.R. Section 240.8c-1.

[4] Counts 9 through 13, citing Title 15 U.S. Code Section 78j(b) and 17 C.F.R. Section 240.10b-5.

[5] Counts 14 through 28 and 34, citing Title 15 U.S. Code Section 78q(a) and Title 17 C.F.R. Section 240.17a-3.

[6] Counts 29-33, citing Title 18 U.S. Code Section 1001 and with respect to Count 34 citing Title 17 C.F.R. Section 240.17a-5.

counts of false record keeping. Evidence on the conspiracy and substantive counts was introduced indiscriminately.

The Estate of Daniels

The indictment moved to trial charged in both the conspiracy and in a substantive count that the defendants[7] caused CP to violate Rule 10b-5 by misappropriating the proceeds of securities given CP by the Executor of the Estate of Daniels to sell. Testimony with respect to this count was lengthy. Ten witnesses were heard, nine of whom were presented by the Government. None of the testimony concerned petitioners Netelkos or Ysrael. At the close of the Government's case the Court dismissed the substantive count and redacted so much of the conspiracy count as charged this misappropriation as an object and overt act. The Court found the proof was one cognizable only as simple larceny and not a violation of Rule 10b-5. The Court, however, permitted the evidence to be considered by the jury as evidence of the keeping of false books and records. No interim or closing limiting instructions were given as against whom the jury could consider this evidence.

The Court stated that in his charge (6376-7378)[8] he would advise the jury that with respect to counts charging the selling of customer securities, without obtaining customer direction to do so, he had not permitted testimony as to whether customers lost money and that therefore they were not to speculate concerning this. The court added "[B]ut they can use the Daniels thing . . .". Both Government and defense attorneys joined together in objection. The Court responded that such objection if granted would result in an "instantaneous reversal" in the event of conviction. The Government persisted in its objection but the Court was adamant, seeking to save the trial. The

(7) Petitioner Ysrael was charged only with conspiracy.

(8) Matters in parenthesis refer to pages of trial transcript.

Court also noted that with respect to the Daniels matter a Pinkerton charge would be inapplicable (5840).

The selling of Customers Securities

A number of customers of CP bought securities through the firm acting in the normal course of its business as a broker-dealer in securities. As is the custom these securities were delivered in street name[9] and retained by CP as bailee. Subsequently, CP sold these securities (without obtaining customer consent) in trading with other broker dealers and commingled the proceeds with funds used in the operation of CP's business. The Government charged that the sale by CP to other broker-dealers without obtaining customer consent and the commingling of funds was a violation of Rule 10b-5. The defense contended that these counts should have been dismissed under the Court's ruling with respect to the Daniels matter, on the ground that this too was, if proved, simple larceny and not a 10b-5 violation. It was argued that it was immaterial whether or not the customer had given a direction to sell. The Government neither charged or produced proof that these sales caused injury to the customer touching his purchase of the securities as an investor.

Multiple Conspiracies

The defense contended and reiterates that multiple conspiracies were proven upon the trial and that the evidence was such as to result in fatal variance. The prosecution argued for a rule of law strange to our system. The question was one, the Government said, of whether ***the indictment*** charged only one conspiracy and whether ***that*** con-

(9) Stock in the name of the person to whom it was issued accompanied by a stock power.

spiracy was proven not whether other additional conspiracies were proven. The prosecutor said:

> ". . . I was just arguing against the proposition that only one conspiracy was proved. The question is, does the indictment charge one conspiracy and did we prove that conspiracy; not whether or not the jury could have inferred other conspiracies were coexisting at the same time." (6018-6020)

What concerned the prosecution was the severely prejudicial testimony of one Horvat, a principal Government witness. He was an officer of Horvat Maniscalco & Co., Inc. ("HM"), a registered broker-dealer. HM bought and sold securities for its customers on an agency basis only i.e., clearing both securities and customer funds through another broker (Dopler & Co.). By clearing in this manner HM was required to have only the minimum capital required by applicable Securities and Exchange Commission rules. Horvat testified that in and about September 1973 the financial condition at HM was poor and that HM commenced to operate on a self clearing basis taking customer funds on purchase orders but unlawfully not filling the orders at the time taken in anticipation that the market was in a downward trend and that the securities could be purchased at a later time when the market price was lower. For this operation HM kept a secret second set of books and ledgers in its own name and used a customer account which Netelkos had at CP to buy and sell securities for HM customers. CP closed its doors on April 10, 1974 and HM not knowing of what was happening at CP found itself with some $100,000 in cash and approximately $200,000 in securities tied up in the customer account maintained by Netelkos at CP. An information was filed against Horvat and his co-officer, Maniscalco. Horvat pleaded guilty to the information and testified as a Government witness to the above facts upon

the trial. None of this had any relevancy to the conspiracy charged in the instant indictment but this testimony was received over objection. With particular respect to petitioner Ysrael she had no connection with this matter at all. The Court gave no limiting instructions either interim or at the close of the case.

The Court's Charge

The defense requested that the Court marshall the evidence and give the defendants' theory of the case (6015). The Court refused to do so, considering the matter as one for the sole discretion of the Court. The Court said to the jury:

> "• • • Obviously, the record in this case is so lengthy that no purpose would be served by me attempting to give you a complete analysis of the entire record or all of the testimony of these people. . . ." (6352)

In addition to the refusal to summarize the evidence the Court gave an "all or nothing" charge with respect to the conspiracy count in the precise language characterized by the Second Circuit as impermissible and plain error requiring reversal; and gave a confusing charge on reasonable doubt.

Petitioner Ysrael, A Fringe Defendant

The petitioner was a bookkeeper at CP. She was one of four back-office personnel who posted into the books. The testimony of Government witnesses was that petitioner had no authority to determine what was to be posted into the records. The blotters were prepared by other clerks and she merely posted the information. Her job, it was testified, could have been done by a computer. She was in no manner part of management. The immediate superior of petitioner and the three other bookkeeping personnel was the Controller, Lowick, who pleaded guilty to a count of

keeping false records. The petitioner was thus not involved in any of the substantive counts, which were alleged as objects of the conspiracy with which she was charged.

The Sentence of Netelkos

Defendants Gamarekian and Rega (president of CP) received sentences of imprisonment of five years, and fines of $20,000. Sentences on all 34 counts to run concurrently. Petitioner Netelkos was sentenced to imprisonment for eleven years and a fine of $50,000, as follows:

(a) Counts 2-8, 2 years each concurrent and a fine of $10,000;

(b) Counts 9-13, 2 years each concurrent but consecutive to counts 2-8 and a fine of $10,000;

(c) Counts 14-28, 2 years each concurrent but consecutive to counts 2-18 and 9-13 and a fine of $10,000;

(d) Counts 29-33, 2 years each concurrent but consecutive to counts 2-8, 9-13 and 14-28 and a fine of $10,000;

(e) Count 34, 2 years and a fine of $10,000 to run consecutively to all of the above;

(f) Count 1, 5 years to run concurrent with all of the above. The Petitioner to stand committed on all fines until paid.

During the trial Netelkos apparently aroused the ire of the stern Magistrate by taking over the cross examination of Government witnesses after his attorney confessed his inexperience and his lack of expertise on technical securities matters. (711, 3814) At one point in cross examination of a Government witness Netelkos was attempting to focus the attention of the witness on a particular point. The Judge suddenly interjected before the Jury "You are jerking me around now . . ." (3797). At another point in the trial outside of the Jury's hearing the Court said "I

don't think there's anything in Mr. Netelkos' history that shows that he's mended his ways" (4630). The basis for that statement was not disclosed and presumably the Court had no information at its disposal.

It is submitted that it is abundantly evident that the factual issues were closely contested, so as to render the protection of the rights of petitioners imperative.

Reasons For Allowance of Writ

A BROKER IN POSSESSION OF CUSTOMER'S SECURITIES AS A BAILEE DOES NOT COMMIT A FEDERAL OFFENSE VIOLATIVE OF RULE 10b-5 WHEN HE SELLS THE SECURITIES WITHOUT DIRECTION OF THE CUSTOMER AND COMMINGLES THE PROCEEDS WHERE THE INDICTMENT DOES NOT CHARGE AND NO PROOF IS OFFERED THAT SUCH PRACTICE WAS ONE TOUCHING THE CUSTOMER IN HIS PURCHASE OF THE SECURITIES AS AN INVESTOR.

Christian Paine came into possession of securities of various of its customers having purchased them, in the usual course of its business, by direction of said customers. In accordance with custom, the securities were delivered by selling brokers to Christian Paine in street name and held by it as bailee in the absence of customer request to transfer the securities into customer name and deliver to customer. The indictment charged and the Government contended that the mere act of selling by Christian Paine of customer securities without direction by the customer and the commingling of the proceeds was, *per se*, a violation of Rule 10b-5. These charges are alleged as an object of the conspiracy and is contained in substantive counts 9-13.

The petitioners contend that this conduct was not violative of Rule 10b-5 by reason of the fact that the conduct complained of does not meet the required condition of Rule 10b-5 that the practice be one "in connection with the purchase or sale of any security." The *selling* of customer securities is not, without more, conduct touching customer's *purchase* of the securities as an investor. This "touching" as "an investor" is the key to the standard which this Court appears to enunciate in *Superintendent of Insurance* v. *The Bankers Life and Casualty Company,* 404 U.S. 6, 30 L. Ed. 2d 128, 92 S. Ct. 165 (1971).

The failure of the trial and appellate courts to recognize that Christian Paine was a bailee under the circumstances related and the conclusions flowing from its status as such in the subsequent sale of customer's stock is in conflict with the decisions of the District Courts in the Second and Seventh Circuits, *Rich* v. *Touche Ross & Co.,* 415 F.Supp. 95 (S.D.N.Y. 1976 Brieant, D.J.) and *The Lincoln National Bank* v. *Lampe* (N.D. Ill. E. D. 1976 Decker, D.J.), 414 F. Supp. 1270. In *U.S.* v. *Charnay* (9th Cir.1976) the Court held that precedents established in civil cases interpreting Rule 10b-5 are applicable to criminal cases.

Further, the indictment upon which the case went to trial contained a charge alleged as an object of the conspiracy and a substantive count, that the petitioners had caused Christian Paine to violate Rule 10b-5 under circumstances where an executor of the Estate of Daniels delivered certain securities to Christian Paine for sale and Christian Paine, having sold the securities, commingled the proceeds and made only partial payment to its customer. The Trial Court, at the close of the Government's case, held that these circumstances did not constitute a violation of Rule 10b-5 and, thus not a federal offense. It was, the Court held, a simple larceny, apparently to be dealt with by local courts. It is submitted that the Court erred in refusing to

dismiss counts 9 through 13 for the same reason. It is immaterial whether or not the sale was made by a broker pursuant to the direction of the customer where in both instances the broker was lawfully in possession of the securities consequently sold. In any event the petitioners contend that the reasons given for the dismissal of the Daniels count became the law of the case. Cf. *U.S.* v. *Spletzer* (5th Cir. 1976), 535 F. 2d 950. Also, in *Superintendent of Insurance,* cited supra, the Court noted that "Manhattan suffered an injury as a result of deceptive practices touching its sale of securities as an investor." The Trial Court here did not permit testimony with reference to whether or not customers had lost money and did not permit the jury to speculate concerning that (6026).

In view of the fact that the conspiracy count included as objects and overt acts, all of the various groups of substantive counts, a reversal of the conviction of petitioner Netelkos on counts 9 through 13 would require a reversal of the conviction under the conspiracy count as there would be no way of determining under which group of conspiracy objects the petitioner was found guilty. *U.S.* v. *Dansker* (3rd Cir. 1976), 537 F. 2d 40, 51.

The Trial Court in the giving of an "all or nothing" charge with respect to the conspiracy count committed plain error. The affirmance by the Court of Appeals here is in conflict with the holding of the Second Circuit. The Court in giving to the jury the question of whether there was present multiple conspiracies instructed the jury as follows (6356):

> "[I]f you find upon all the evidence that more than one conspiracy has been proven, that there were several separate and distinct conspiracies and certain persons were members of one conspiracy and others were members of another or other conspiracies, even though one or more persons may have

been members of each conspiracy, it is your duty to acquit all the defendants of the conspiracy count of the indictment."

This "all or nothing" charge was equivalent to an instruction that the jury could not acquit one defendant without acquitting all of the other defendants. This charge was condemned in *U.S.* v. *Borelli* (2d Cir. 1964), 336 F. 2d 376, 384-386 & n. 4, cert. denied sub nom. *Cinquegrano* v. *U.S.*, 1965, 379 U.S. 960, 85 S. Ct. 647, 13 L. Ed. 2d 555, *U.S.* v. *Kelly* (2d Cir. 1965), 349 F. 2d 720, cert. denied 384 U.S. 947 (1966), was plain error.

The Court in *Kelly*, supra, said emphatically:

> "Furthermore, lest the matter be left in any doubt, we hold that the "all or nothing" instruction in this case was "plain error" requiring reversal even in the absence of objection at the trial. Fed. Rules Crim. Pro., 52(b)." At p. 758.

This charge was particularly prejudicial to petitioner Ysrael, a fringe defendant.

THE TRIAL COURT'S REFUSAL OF DEFENDANTS' REQUEST TO MARSHALL THE EVIDENCE AND CHARGE THE DEFENDANTS' THEORY OF THE CASE WAS REVERSIBLE ERROR.

The trial was of a lengthy and complex nature and the Court commented in his charge to the jury that no purpose would be served to attempt to give them an analysis of the "entire record or of the testimony of these people." (6352)

The Trial Court was requested to summarize the evidence and accordingly instruct the jury on the defendants' theory of the case The Court, facing what appeared to

it to be a difficult task, avoided this responsibility and took the position that the determination was wholly a matter of discretion, which it declined to exercise. In this, it is submitted, there was reversible error. The Court's determination was in conflict with decisions in the 2nd, 7th and 10th Circuits. *U.S.* v. *Swallow* (10th Cir. 1975), 511 F. 2d 514, 523; *U.S.* v. *Mathis* (D.C. App. 1976), 535 F. 2d 1303, 1305; *U.S.* v. *Indian Trailer Corp.* (7th Cir. 1955), 226 F. 2d 595, 598. The rule is well stated in the *Swallow* case, cited supra:

> "We must agree that the defendant was entitled to instructions on any theory of defense finding support in the evidence and the law, and that a refusal of such instructions is reversible error. *Beck* v. *United States,* 305 F. 2d 595 (10th Cir.), cert. denied, 371 U.S. 890, 83 S Ct 186, 9 L Ed 2d 123; *United States* v. *Noah,* supra. Even though the evidence may be weak, insufficient, inconsistent or of doubtful credibility, its presence requires an instruction on a theory of defense. *United States* v. *Indian Trailer Corporation,* 226 F. 2d 595, 598 (7th Cir.): *Tatum* v. *United States,* 88 U.S. App. D.C. 386, 190 F. 2d 612, 617."

In *U.S.* v. *Kelly,* cited supra, a case which likewise involved lengthy, protracted and complex securities violations similar to the instant case, the Court stated that it was important that the Trial Court should have marshalled the proofs. Counsel for the defendants and for the Government, in *Kelly,* requested that the Trial Judge omit the marshalling of evidence, which request was acceded to. The Court of Appeal found that the Trial Judge should not have agreed to the request.

In *U.S.* v. *O'Connor* (2d Cir. 1956), 237 F. 2d 466, the Court noted that "the trial covered a period of 50 days. The Government introduced 435 complicated and frequently

confusing exhibits. In addition the defendant introduced 145 exhibits. The staggering task of properly analyzing these exhibits was left to the jury without adequate instruction." This was the posture that the jury was left in in the instant case.

THE FAILURE OF THE TRIAL COURT TO PROVIDE PETITIONER YSRAEL A FRINGE DEFENDANT, WITH ANY OF THE SAFEGUARDS AGAINST TESTIMONY AND EXHIBITS INADMISSIBLE TO HER MANDATES REVERSAL AS PLAIN ERROR.

While it is well settled that certain defendants in multifacted conspiracy cases can be so enmeshed as to make it unnecessary to inquire into the methods which the scheme proliferated as against them, Ysrael, like the defendant Shuck in *United States* v. *Kelly,* cited supra, was in a different position, and the failure of the trial judge to recognize this difference and to take the steps necessary for the protection of her rights makes it necessary for this Court to exercise its power of supervision, as the conduct of the trial court mandates reversal. A good part of the trial testimony and hundreds of exhibits was devoted to the sale and hypothecation of customer securities and the filing of false reports, none of which was admissible as against Ysrael. The classic rule to be applied in joint conspiracy trials was stated by Mr. Justice Rutledge in *Blumenthal* v. *United States,* 1947, 332 U.S. 539, 559-560, 68 S. Ct. 248, 92 L. Ed. 154, that defendants were to be provided with safeguards "as impregnable as possible" by "clear rulings on admissibility, limitations of the bearing of evidence as against particular individuals, and adequate instructions." What were the safeguards for the protection of Ysrael that the trial court should have applied? The Second Circuit in *United States* v. *Kelly,* cited supra, spelled them out:

> "One . . . was the granting of a severance as to Shuck the moment it appeared that he was likely to be prejudiced by the accumulation of evidence of wrongdoing by his co-defendants. Another was making clear in the instructions to the jury that the proofs against Shuck were different from the proofs against [the principal defendants], pointing out what the difference was . . . and making sure that Shuck was given separate and individual attention . . . A third safeguard was by interim instructions and by positive and clear instructions at the close of the case to give Shuck every possible protection against the use of prejudicial and inadmissible testimony and exhibits." (p. 756-757)

The Court in the instant case followed none of these safeguards with respect to the defendant Ysrael.

Counsel on numerous occasions during the trial moved for severance with respect to Ysrael. It is well settled that the trial judge is under "a continuing duty to grant severance if prejudice to a particular defendant is made manifest" *Schaffer* v. *United States,* 1960, 362 U.S. 511, 516, 80 S. Ct. 945, 948, 4 L. Ed. 2d 921. Ysrael was mentioned fairly early in the trial with respect to certain ledger entries and never again. As the trial dragged on for its eight week duration the prejudice to Ysrael became apparent with each passing day. The principal and inevitable prejudice was caused by the slow but inexorable accumulation of evidence of alleged fraudulent practices against codefendants which evidence was presented indiscriminately on the conspiracy and substantive counts.

This prejudice accumulated against Ysrael was further exacerbated by the "all or nothing" charge on the conspiracy count and the refusal of the trial court to marshall the evidence. In *United States* v. *Kelly,* cited supra, the Court said (at page 757) with respect to fringe defendant Shuck in connection with the "all or nothing" charge that

"nothing could be more prejudicial" and that "the error is of such grave consequences to Shuck to fall into the category of "plain error". The holding of the appellate Court in the instant case, affirming the conviction of Ysrael, is in sharp conflict with the holdings of the Second Circuit.

THE APPELLATE COURT HAD THE INHERENT POWER TO REVIEW THE SENTENCE OF NETELKOS AND TO MODIFY THE SAME EVEN THOUGH IT WAS WITHIN STATUTORY LIMITATIONS.

IT IS NOT CONSTITUTIONALLY MANDATED THAT THE "SAME FACTS" TEST BE APPLIED TO DETERMINE WHETHER SEPARATE SENTENCES CAN BE GIVEN ON SEPARATE COUNTS. THE RIGHTS OF PETITIONER NETELKOS PURSUANT TO THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WAS VIOLATED BY THE SENTENCE IMPOSED ON HIM.

The defendant Netelkos received what is probably the severest sentence ever handed down in a securities case.[10] This defendant received a set of concurrent and consecutive sentences of eleven years and a fine of $50,000[11] on what was essentially a single course of conduct fragmented into various counts (33 counts) by the skill of the pleader. Co-defendants found guilty of the same offenses received 5 years and a $20,000 fine. The Court in affirming the judgment of conviction and in view of the Bench comments on

[10] In *U.S.* v. *Stein* (2nd Cir 1976) Slip op. 76-1299 of October 22, 1976 a ten year sentence was reversed one of Circuit Judges, Lumbard J. stated that the sentence was unprecedented and beyond all reason and so severe as to be violative of the 8th Amendment to the U.S. Constitution.

[11] The sentence given Netelkos is set out at page 12, supra.

argument of the appeal refused to review the disparate sentences and also applied the "same facts" test of double jeopardy, i.e., that where different counts require proof of a different fact the offenses are separate and the defendant may be sentenced on each of said counts. The appellant's position in this appeal is and has been that where several convictions rest upon the same ultimate facts only one sentence can be sustained. The principles involving the sentencing of Netelkos is, it is submitted, of great importance to a large group of persons and to the public, *Appellate Review of Sentences, A Symposium at the Judicial Conference of the United States Court of Appeals for the Second Circuit* (1962) 32 F.R.D. 249 (1963) Remarks of Kaufman, J. pp. 260-261. The position taken by both trial and appellate courts herein is contrary to the holding of the Supreme Court of the United States in *Ashe* v. *Swenson,* 1969, 397 U.S. 436, 448 25 L. Ed. 2d 469, 90 S. Ct. 1189 (separate opinion of Brennan, J.) that the "same facts" test is not constitutionally mandated. The holding is also in conflict with the Sixth and Seventh Circuits in *U.S.* v. *Jones,* (6th Cir. 1976) 533 F. 2d 1387 and *U.S.* v. *Fusco* (7th Cir. 1970) 427 F. 2d 361. Further, the position of Appellate Court that it would not review a sentence which is within the statutory limits is in conflict with the Second Circuit in *U.S.* v. *Stein,* cited supra in footnote 10 and the Eighth Circuit, *Woolsey* v. *U.S.* (8th Cir. 1973) 478 F. 2d 139.

Further, the question of whether an appellate court may review a sentence pursuant to the statutory provision in 28 U.S.C. § 2106, authorizing the appellate courts to ". . . modify . . . any judgment . . . brought before it for review", should be settled by the Supreme Court of the United States particularly in view of the fact the above quoted portion of Section 2106 is viewed as the statutory authority for proposed Rule 35.1 for review of sentences

submitted by the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

In *United States* v. *Fusco,* (7th Cir. 1970), 427 F. 2d 361 *Ashe* was viewed as having clearly gone beyond the "same evidence" test. The Court relying upon the broad definition of collateral estoppel found in *Ashe* and the admonition that the test was to be applied with realism and rationality, held that a violation of the ban against double jeopardy would occur whenever an issue of ultimate fact had been determined by a valid and final judgment. Thus where several convictions rested upon the same ultimate facts, only one sentence could be sustained. Clearly, the *Ashe* decision has rejected the notion that the Government can institute successive prosecutions if their attorneys are artful enough to discover additional facts for the subsequent pleadings. To draw, therefore, a distinction between the constitutional implications of double jeopardy as found in successive prosecutions, and the implications of multiple punishments, would be to create a distinction without a difference. The defendant Netelkos should not be forced to suffer consecutive sentences based upon criminal offenses which are premised upon the same ultimate fact or transaction. This has particular reference to all of the substantive counts alleged in the Indictment.

The great number of concurrent sentences imposed upon Netelkos was likewise unconscionable. Parole authorities will certainly be less likely to parole a prisoner serving numerous sentences concurrently than one serving a single sentence. In *United States* v. *Garner* (6th Cir. 1976), 529 F. 2d 562 the Court said that notwithstanding the "concurrent sentence rule"

> "Because of the possibility of prejudice to appellant when she is considered for parole, we exercise our discretion and reverse her conviction under the conspiracy count" (p. 970)

In *United States* v. *Austin* (6th Cir. 1976), 529 F. 2d 559 the Court remanded the case with instructions to vacate or set aside a sentence imposed upon the conspiracy count, saying,

> "Our examination of the record persuades us that essentially the same evidence in this case was relied upon to prove both the conspiracy count and the substantive offenses. The proof was offered indiscriminately on all three counts and it would be difficult, if not impossible to weed out any item of evidence that was not pertinent to all counts. The overt acts in the fourth count were all relevant in proving the substantive offenses as well and the conspiracy." (p. 563)

The Court concluded that the appellant was doubly punished "in violation of the Fifth Amendment" (p. 564). This conclusion is equally applicable to Netelkos in the case at bar.

The statement made in the Working Papers of the National Commission on Reform of Federal Criminal Laws (July 1970) is pertinent here:

> "It seems beyond argument that the appropriate sentence and the number of years for which a man shall be punished for an offense is not rationally a function of the number of statutory violations into which his conduct may be passed by a clever pleader" (p. 341).

The case is one wherein the two petitioners have been convicted and sentenced under circumstances indicative of deviations from established law. It is further manifest that the present application presents meritorious and certainly arguable questions of a kind likely to arise in other cases and calling for authoritative disposition; also that are several instances where there is a conflict of opinion among the several Courts of Appeals. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioners respectfully pray that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit to the end that this cause may be reviewed and determined by this Court; that the determination, order and judgment of the said Court of Appeals may be reversed, and that petitioners be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y.
January 17, 1977

BERNARD JAY COVEN P.C.
Attorneys for Petitioners
747 Third Avenue
New York, N. Y. 10017

BERNARD JAY COVEN
of Counsel

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA

v.

CHRISTOS L. NETELKOS, CHARLES H. GAMERIKIAN, JOSEPH J. REGA, JR., GEORGE SANTORIELLO, GEORGETTE YSRAEL, LUCILLE DITTA, ROSS W. PASCALL

(Crim No. 75-103 D.N.J.)

Argued October 18, 1976

Before SEITZ, *Chief Judge,* HUNTER and GARTH, *Circuit Judges.*

JUDGMENT ORDER

After considering the contentions raised by the appellants, to-wit, that the court erred in (1) refusing to decide as a matter of law whether the evidence showed multiple conspiracies rather than the single conspiracy charged in the indictment (2) admitting evidence which proved, if anything, multiple conspiracies rather than the conspiracy charged (3) admitting evidence which proved, if anything, a conspiracy to engage in activities not mentioned in the indictment (4) admitting evidence of a scheme to defraud the Estate of Wilfred Daniels in proof of the conspiracy count (5) failing to consolidate all of the indictment into the conspiracy count (6) failing to dismiss Counts 1-8 on the grounds that they did not charge all the elements of the offense (7) failing to dismiss Counts 9-13 on the grounds

that they did not charge activities which are criminal under the securities laws (8) allowing improper testimony by Gerhard Frank as to the authenticity of certain documents (9) failing to declare a mistrial on the grounds that the government did not timely furnish the defense with certain written notes, and never furnished a list of the witnesses it intended to call at trial, or confirmation of whether it would rely on the "net capital rule" (10) admitting evidence that Netelkos burned records of Christian Paine, and struck an examiner from the National Association of Securities Dealers (11) failing to adequately supervise Netelkos' pro se representation to ensure that his co-defendants would not be prejudiced (12) failing to declare a mistrial as to Netelkos on grounds of incompetency of counsel (13) failing to dismiss Count 1 as to Netelkos on the grounds that it exposed him to double jeopardy (14) improperly questioning witnesses and summarizing testimony (15) denying a request that it summarize the evidence and instruct the jury on the defendants' theory of the case (16) creating an atmosphere of intimidation (17) issuing a confusing and inadequate charge to the jury (18) imposing excessive sentences (19) failing to disqualify itself, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

By the Court,

SEITZ
Chief Judge

Attest:

/S/ THOMAS F. QUINN
Thomas F. Quinn
Clerk

Dated: Nov. 12, 1976

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1191

UNITED STATES OF AMERICA

v.

CHRISTOS L. NETELKOS, et al.,
Christos L. Netelkos, Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

SEITZ
Judge

Dated: December 20, 1976

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 76-1195

UNITED STATES OF AMERICA

v.

CHRISTOS L. NETELKOS, et al.,
Georgette Ysrael, Appellant

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* VAN DUSEN, ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

SEITZ
Judge

Dated: December 20, 1976

APPENDIX B

STATUTES INVOLVED

SECTION 371 of Title 18 U.S. Code:

> "If two or more persons conspire either to commit any offense against the United States, or any agency thereof in any manner or for any purpose, and one or more of such person commit any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

SECTION 78h(c) of Title 15 U.S. Code:[1]

> "It shall be unlawful for any member of a national securities exchange, or any broker or dealer who transacts a business in securities through the medium of any such member, directly or indirectly—
>
> • • •
>
> (c) In contravention of such rules and regulations as the Commission shall prescribe for the protection of investors to hypothecate or arrange for the hypothecation of any securities carried for the account of any customer under circumstances (1) that will permit the commingling of his securities without his written consent with the securities of any other customer, (2) that will permit such securities to be commingled with the securities of any person other than a bona fide customer, or (3) that will permit such securities to be hypothecated, or subjected to any lien or claim of the pledgee, for a sum in excess

(1) Section 78h was amended in 1975, Pub.L.94-29 Section 5(1), to include within the class affected any registered broker-dealer without regard to membership in a national securities exchange or the conducting of business through such exchange. The amendment was effective subsequent to the trial in this case.

of the aggregate indebtedness of such customers in respect of such securities."

SECTION 240.8c-1 of Title 17 C.F.R. (pertinent provisions):

"(a) *General provisions.* No member of a national securities exchange, and no broker or dealer who transacts a business in securities through the medium of any such member shall, directly or indirectly, hypothecate, loan, borrow, or arrange for or permit the continued hypothecation or loan of any securities carried for the account of any customer under circumstances—

(1) that will permit the commingling of securities carried for the account of any such customer with securities carried for the account of any other customer, without first obtaining the written consent of each such customer to such hypothecation or loan;

(2) that will permit such securities to be commingled with securities carried for the account of any person other than a bona fide customer of such member, broker or dealer under a lien for a loan made to or by such member, broker or dealer; or

(3) that will permit securities carried for the account of customers to be loaned, hypothecated, or subjected to any lien or liens or claim or claims of the pledge or pledgees, for an aggregate sum which exceeds the aggregate indebtedness of all customers in respect of securities carried for their accounts:

• • •"

SECTION 240.10b-5 of Title 17 C.F.R. (pertinent provisions):

"It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange

(1) to employ any device, scheme or artifice to defraud,

• • •

(3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."

SECTION 78q(a) of Title 15 U.S. Code:

"(a) Every national securities exchange, every member thereof, every broker or dealer who transacts a business in securities through the medium of any such member, every registered securities association, and every broker or dealer registered pursuant to section 78*o* of this title, shall make, keep, and preserve for such periods, such accounts, correspondence, memoranda, papers, books, and other records, and make such reports, as the Commission by its rules and regulations may prescribe as necessary or appropriate in the public interest or for the protection of investors. Such accounts, correspondence, memoranda, papers, books, and other records shall be subject at any time or from time to time to such reasonable periodic, special, or other examinations by examiners or other representatives of the Commission as the Commission may deem necessary or appropriate in the public interest or for the protection of investors."

SECTION 240.17a-5 of Title 17 C.F.R. (pertinent provisions):

"(a) *Filing of Monthly and Quarterly Reports*

(1) This paragraph (a) shall apply to every broker or dealer registered pursuant to section 15 of the Act.

(2)(i) Every broker or dealer subject to this paragraph (a) who clears or carries customer accounts

shall file Part I of Form X-17A-5 within 10 business days after the end of each month.

* * *

(3) The reports provided for in this paragraph (a) shall be considered filed when received at the Commission's principal office in Washington, D. C. and the regional office of the Commission for the region in which the broker or dealer has its principal place of business. * * *."

SECTION 240.17a-3 of Title 17 C.F.R. (pertinent provisions):

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

* * *

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser."

SECTION 78ff of Title 15 U.S. Code (pertinent provisions):

"(a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 780 of this title or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof, which statement

was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than five years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation."

SECTION 1001 of Title 18 U.S. Code:

"Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

SECTION 2106 of Title 28 U.S. Code (pertinent provisions):

"The Supreme Court or any other court of appellate jurisdiction may . . . modify . . . any judgment . . . lawfully brought before it for review * * *"